IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

PAUL WILSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF COURTS BELOW

The opinion of the District Court is to be found in the official transcript of record on page 169.

The opinion of the Circuit Court of Appeals for the Sixth Circuit will be found in the official transcript of record on page 182.

JURISDICTIONAL GROUNDS

Statement of grounds upon which the jurisdiction of this Court is invoked is set out in the petition to which this brief is attached.

STATEMENT OF CASE

Statement of the case containing all that is material to the questions presented is set out in the petition to which this brief is attached.

SPECIFICATION OF ERRORS

Specification of errors are set out in the petition, under heading III, to which this brief is attached.

SUMMARY OF ARGUMENT

A. A consideration of all the evidence compels the conclusion that petitioner had applied for a license to operate Sharp's Tourist Court which license had not been granted and he was not in control of the business; that he didn't personally commit the offense, if an offense was committed at Wallsend Tourist Place, and that it was entirely insufficient to support a judgment and conviction in a criminal case according to the well-defined rules of criminal law.

B. By taking judicial knowledge of the Federal Register, the Honorable Court should have supported the petitioner's position that Regulation 445 as it existed at the time of this supposed offense did not fix and establish a ceiling price or a price that petitioner was allowed to pay for the whiskey involved, and thus he suffered an injustice which constitutes a reversible error for which the cause should be remanded to the District Court for a trial de novo.

C. Regulation 445 dealing with intoxicating liquors violates the 21st Amendment to the Constitution and that the Federal Government may not rely upon either the due process clause, commerce clause or the equal protection clause of the Constitution to act in the liquor field.

D. Your petitioner was convicted on counts 1 and 6 for the sale of two cases of Rocking Chair whiskey and one case of Spring Hill whiskey when, in fact, said whiskey was sold to Robert Carter Barrett by one Luther Floyd. The said Floyd was indicted for the sale of said

whiskey and on the indictment pleaded guilty and has since served a sentence for said offense. That to convict this petitioner on a charge to which another has pleaded guilty and served time is an inexcusable injustice which is contrary to every concept of right, and that the United States Attorney has recognized that this petitioner has been done an injustice.

ARGUMENT

A.

A consideration of all of the evidence compels the conclusion that Petitioner had applied for a license to operate Sharp's Tourist Court which license had not been granted and he therefore was not in control of the business; that he did not personally commit the offense, if an offense was committed at Wallsend Tourist Place, and that it was entirely insufficient to support a judgment and conviction in a criminal case according to the well-defined rules of criminal law.

It should be kept in mind that the offense for which the Petitioner stands convicted in the first and sixth counts is defined under section 3250 of the United States Code which provides in general . . . Wholesale dealers in liquors shall pay a special tax of $110.00.

This is an occupational tax, that is, it is a tax to be paid by persons who are engaged in the wholesale whiskey business.

The penalty for a violation of the aforesaid section is defined in section 3253, Title 26 of the Internal Revenue Code and is a follows:

Penalties and Forfeitures for nonpayment of special tax.—Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in

malt liquors, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States. (53 Stat. 391).

The federal liquor license statute represents a mode of imposing taxes on such business, so that before there can be a conviction there must be evidence of an intention of defrauding the Government of its revenue. It was so held in *U. S.* v. *Jackson* (CCBA) Federal case 154, 55; 1 Hughes, 531.

It has likewise been held that an isolated sale at wholesale did not make the seller a wholesaler. *U. S.* v. *Feigelstock* (CCNY) Federal case 150, 84, 14 Blatchf, 321.

Title 26, section 3272—Returns—(a) Time for filing.—It shall be the duty of the special taxpayers to render their returns with remittances to the collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive such returns, duly signed and verified, together with the remittances, not later than the last day of the month, except in cases of sickness or absence, as provided for in section 3634.

Section 3271 (a) of the Internal Revenue Code pro-

viding that a person shall not engage in a trade or business making him liable to an operation tax until he has paid the privilege tax in the manner provided, and the above section giving him until the last day of the month in which the operation tax liability commences to file his return and pay the operation tax must be construed together, and while the tax liability accrues on the commencement of business. The taxpayer has until the last day of the month in which the tax liability commences, to file his return and pay the tax. This is the construction placed upon these statutes by the Circuit Court of Appeals for the 10th Circuit. See *Farmer* v. *U. S.*, 128 Federal (2d) 970.

Section 3280, Title 26 of the U. S. Code provides:

Liability in case of death or change of location. (a) Requirements.—When any person who has paid the special tax for any trade or business dies, his wife or child, or executors or administrators or other legal representatives, may occupy the house or premises, and in like manner carry on, for the residue of the term for which the tax is paid, the same trade or business as the deceased before carried on, in the same house and upon the same premises, without the payment of any additional tax. And when any person removes from the house or premises for which any trade or business was taxed to any other place, he may carry on the trade or business specified in the collector's register at the place to which he removes, without the payment of any additional tax; Provided, That all cases of death, change, or removal, as aforesaid, with the name of the successor to any person deceased, or of the person making such change or removal, shall be registered with the collector, under regulations to be prescribed by the Commissioner.

B.

By taking judicial knowledge of the Federal Register, the Honorable Court should have supported the Petitioner's position that Regulation 445 as it existed at the time of this supposed offense did not fix and establish a ceiling price or a price that Petitioner was allowed to pay for the whiskey involved, and thus, he suffered an injustice which constitutes a reversible error for which the cause should be remanded to the District Court for a trial de novo.

It is our position that the law of this case was to be found in the Federal Register published Wednesday August 11th, 1943, insofar as counts 3 and 4 of the indictment are concerned, and that there was no other law or rules of law that could be applied. (See Appendix, Page 26.)

Beginning on Page 11161, 8 Federal Register, which, incidentally, is the citation or regulation set out in the indictment in this cause, the pertinent part of said Regulation is Article 5, titled, Maximum Prices for sales of packaged distilled spirits and packaged wine by wholesalers, retailers, monopoly states and primary distributing agents. (See Appendix, Page 34.)

We think, clearly, had the Honorable Circuit Court of Appeals for the Sixth Circuit taken judicial knowledge as the statute provides, of this publication in the Federal Register, they would have concluded that the Petitioner had been tried for a violation of a Regulation which was not in existence at the time of the alleged commission of the purported offense and that there was not in existence a formula, etc., as is detailed in the proof and thus, it is that we insist that the judgment of the Circuit Court of Appeals for the Sixth Circuit is erroneous.

By an observation of the record in this cause, it can be seen that the Government and the Honorable Circuit Court of Appeals for the Sixth Circuit determined this

cause by reason of a directive issued by the Office of Price Administration, 4216, Advance Release to the afternoon papers on May 2, 1944, which did in fact set up a formula or formulas and fix the buyer's as well as the seller's pricing. Hence, we respectfully submit that if there is a conviction in this cause it could only be sustained by reason of the regulations which were not in effect at the time of the purported violation which, we think is contrary to the spirit and letter of the law, and the Petitioner would stand committed on a conviction of an offense created by an ex post facto regulation.

Under MPR 445 only the formula for determining the sale price of whiskey was set up and under this regulation a practice had grown up in the industry of paying finders' fees to persons locating whiskey for the retailers. The reasons for Amendment 15 to MPR 445, the OPA bulletin issued on May 2, 1944 and published by the OPA states, and are set out in part, as follows: (For full publication see Record, page 191.)

> "(2) Restrictions were made on the use of finder's and buyer's brokers, allegedly employed to locate sources of supply for anxious buyers. Today's action provides that the broker or agent must be considered the agent of the seller and not of the buyer and that the amount which the buyer pays to the broker plus that which he pays to the seller must not exceed the seller's ceiling price, plus actual transportation charges paid by the agent. This provision will, OPA believes, avoid the tendency, prevalent because of shortage conditions, to shift the selling expense from the seller, whose maximum price includes an allowance for such expense to the buyer."

It can readily be seen, therefore, that the indictment in this case was based on Amendment 15, which did not allow the retailers to charge finder's fees or any expenses except

that set forth in the formula in Amendment 15 to MPR 445, but this amendment was made effective on May 8, 1944, and the offense which the petitioner is charged with having committed was committed in the month of February, 1944, and his conviction under this Amendment 15 is a conviction under an ex post facto regulation.

C.

Regulation 445, dealing with intoxicating liquors violates the 21st Amendment to the Constitution and the Federal Government may not rely upon either the due process clause, commerce clause or the equal protection clause of the Constitution to act in the liquor field. Carter v. Virginia, 321 U. S. 131; Indianapolis Brewing Company v. Liquor Commission, 305 U. S. 191; Finch and Company v. McKittrick, 305 U. S. 395; Mahone v. Triner Corp., 304 U. S. 401; Ziffren, Inc. v. Reeves, 308 U. S. 132.

The State of Kentucky, by appropriate legislation has established a state alcoholic beverage control board. The said board is vested with complete and absolute power to do any and all things necessary to supervise and control the manufacture and sale of alcoholic beverages. Thus, the state has availed itself of the right given it under the 21st Amendment to the Constitution to control the liquor traffic. This matter was before the Supreme Court of the United States in *Ziffrin* v. *Reeves*, 308 U. S. 132; 60 S. Ct. 163, 84 L. Ed. 129. This law is codified in the revised statutes of the State of Kentucky from sections 241010 to 244099.

The alcoholic beverage control law as the the same is referred to in the statute includes the fair trade provision thereof, and in *Ziffrin* v. *Reeves*, supra, this Honorable Court held that the State Legislature under its police power may fix minimum prices on the sale of commodities whether or not affected with a public interest.

Innumerable methods have been devised by legislatures of the several states, and some by the national Congress, in an attempt to properly regulate the liquor traffic • • • and, we can not say that the instant law calling for strict price control and the elimination of ruinous competition has no relation to the subject, or that it is arbitrary or discriminatory and not based on substantial grounds.

In the case of *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 60 S. C. 163, the Kentucky Alcoholic Beverage Control Law was before the Court and the constitutionality of it was sustained. This Act practically covers the entire field with reference to the traffic in intoxicating liquors and we believe that in this opinion the Supreme Court in construing the 21st Amendment vested solely in the states, the rights affecting the liquor traffic as a part of its inherent police power.

The opinion in this cause is strictly in accordance with the opinion of *U. S.* v. *Lanza*, 260 U. S. 377; 43 S. Ct. 141. In the *Lanza* case this Honorable Court held, under the Tenth Amendment to the Constitution, this power, that is the power that was transferred to the Federal Government by the 18th Amendment, originally belonged to the states, reserved to them by the 10th Amendment.

The National Congress after the enactment of the 21st Amendment, legislated in certain respects with reference to intoxicating liquors, that is, to collect the revenue and to aid states that desire to remain dry in the enforcement of the State's statutes, but not otherwise, it being the national view that the people by the 21st Amendment to the Constitution desired that the right to control the liquor traffic was local and belonged to the different states, under the police power of the states, and that the national

government did not possess police power with respect thereto.

Title 27, section 121 of Federal Code Annotated, provides under *State Statutes as Operative On Termination of Transportation; Original Packages*: that, "All fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquids had been produced in such state or territory and shall not be exempted therefrom by reason of being introduced therein in original packages or otherwise". (The Act of August 8, 1890, Chapt. 728, 26 Stat., 313.) This act is commonly known as the Wilson Bill and was held constitutional in *Wilkerson* v. *Rahrer*, 140 U. S. 545.

The National Congress since the enactment of the 21st Amendment has refrained from any legislation pertaining to the control of the liquor traffic. The only law passed by Congress pertaining thereto is the Federal Alcohol Administration Act of August 29th, 1935. Chapt. 814, section 1, 49 stat., 977, provided for the organization of the division of the Treasury Department. The purpose of the said Act, (sec. 203) was to effectively regulate interstate and foreign commerce in distilled spirits, wine and malt beverages, to enforce the 21st Amendment, and to protect the revenue and to enforce the postal laws with reference to distilled spirits, wine and malt beverages.

It is our position that the 21st Amendment left Congress only with such powers to regulate the liquor traffic

as might enable it to assist the States in enforcing their own liquor laws. We think that the opinions of this Honorable Court clearly indicate such to be the law. As said by Mr. Justice Black in the case of *Carter* v. *Virginia*, 321, U. S. 131, "The precise amount of power (21st Amendment) as left in Congress to regulate liquor under the commerce clause, has not been marked out by decisions. This much, however, has been decided that it is a local and not a national right and the regulation of the liquor traffic is now vested exclusively in the states. This is the general constitutional policy.

There is no basis upon which the regulation in question can be justified either as an aid to the State or as a regulation for revenue, the State of Kentucky itself having established a price control in its law. Any effort on the part of the National Government to enter into this field would be an invasion of the rights of the state, a right which was taken away when the 18th Amendment was repealed.

Is is true that the War Powers Acts are extensive and far-reaching, but the Constitution and Constitutional limitations are applicable. *Hamilton* v. *Kentucky Distillery Co.*, 251 U. S. 146; 40 S. Ct. 106. Thus, we think Maximum Price Regulation 445 is null and void because under the Constitution, the National Government did not have a right to exercise this control over intoxicating liquors. We do not think that whiskey and distilled spirits are commodities within the meaning of the acts of Congress. The Congress required in the issuance or promulgation in any resolution that the Administrator shall ascertain prevailing prices between October 1st and October 15th. There is nothing in the Federal Register affirming that this was done.

The 18th Amendment and the construction by the Courts of the different provisions of the Amendment afford us the privilege of learning, to some extent, what powers were withdrawn from the Federal Government by the 21st Amendment. It is true that in the opinion by Mr. Chief Justice White, at a time when various dignified protests were being made and presented that however determined, it is clear that the Honorable Supreme Court determined in its opinion that the American people have a right to amend their Constitution in any way they see fit and that the people of a sovereign state have a wider power to make an amendment to the Constitution than is set out in the Federal Constitution as the people of a sovereign state have the full police power whereas the states granted to the Federal Government under the Constitution, only certain limited authorities. This is true notwithstanding that it overlooks the broad ground taken by Chief Justice Marshall that the Federal Government is the Government of a great nation and can do anything that any Government can do and the American people have a right to prescribe for themselves not only any Government they desire, but any laws and rules of conduct the invocation of which they believe will result in the general good. The 18th Amendment gave to the National Congress power to control the liquor traffic.

Before the enactment of the 18th Amendment, Congress had no power to regulate the liquor traffic as such. This was the opinion of this Honorable Court in *Schnitzler* v. *Yellowley*, 290 Federal 849, and *Millstone* v. *Yellowley*, 290 Federal 855.

It is a fundamental principle of Constitutional Government that if a Constitutional Amendment is in conflict with an older provision so that the two cannot be recon-

ciled or construed together, clearly the older one must yield. Hence, the 18th Amendment in part superseded the Fifth Amendment. *Corneli* v. *Moore,* 267 Federal, 456. See *S. C. on appeal* 253 U. S. 350, 40: S. Ct. Rept. 486. Hence, if there is a conflict or if the 18th Amendment is to be considered at all it would have to be considered as a superseded amendment and all power therein vested would turn back to the state from which it came for if so it be that the power so conferred upon Congress by the 21st Amendment had the effect to wipe out the Constitutional rights theretofore deemed vested and inviolable the situation may be regrettable, but it cannot be helped. The Constitution, when amended, must be construed as a whole. If later amendments destroy, impinge upon, modify or wipe out an old provision, the newer provision must stand because it is the last utterance of the people who reserve to themselves the right to change the organic laws in th way provided by the organic law itself. Of course, the Constitution, when amended, should, if possible, be so construed as to give effect to both the old and new parts.

So to our mind it is utterly futile to present that the National Government at this time possesses any power to regulate or legislate directly with reference to intoxicating liquor within the states other than to assist the states and to protect the revenue. Any other power would, in effect be tantamount to saying that the constitution can not be amended to express the will of the people. True, the people may be mistaken; but under our form of Government they are sovereign and the majority rules. When they change the organic law in the solemn manner provided therein, this change must stand and be fairly construed and honestly followed until it in turn shall be again

changed in due and legal form. Faris, J. in *Fallstaff Corp.* v. *Allen*, 278, Federal 643.

The state in enforcing and applying its law is not ordinarily exerting a power derived from the Constitution or its amendments and is, therefore, not acting under the authority of the United States. However, the Supreme Court of the United States will lend great persuasiveness to the state courts in the interpretation of a state statute, it being ultimately a state question, the final decision which rests with the Court of the State. See *Hebert* v. *Louisiana*, 71 L. Ed.

The authority granted in authorizing by licensing, taxing or permitting, confers no authority upon the citizen with reference to State law. See *Hazel Drug Co.* v. *Wilmer*, 131 Penna., 286. The 21st Amendment clearly returned all the rights to the states.

It is, therefore, the contention of the petitioner that the State of Kentucky regulates the sale of whiskey and that this is a right and authority returned by the 21st Amendment to the Constitution to the State of Kentucky, and that the Federal Government has no authority to interfere with the State in its regulation of the liquor industry except insofar as the same pertains to the revenue of the Federal Government.

D

Your Petitioner was convicted on Counts 1 and 6 for the sale of two cases of Rocking Chair whiskey and one case of Spring Hill whiskey when, in fact, said whiskey was sold to Robert Carter Barrett by one Luther Floyd. The said Floyd was indicted for the sale of said whiskey and on the indictment pleaded guilty and has since served a sentence for said offense. That to convict this Petitioner on a charge to which another has pleaded guilty and served time is an inexcusable injustice which is contrary to every concept of right, and that the United States Attorney, as aforesaid, recognizes that this Petitioner has been done an injustice.

Count No. 1, which charges that petitioner carried on a wholesale liquor business without paying the special tax required, depended upon the evidence which supports Count No. 6. Your petitioner respectfully submits that after his trial and conviction on these two counts he received information that one Luther Edwin Floyd was also indicted and had been convicted for selling the self-same cases of whiskey at the same time to the same Robert Carter Barrett, that the indictment of Luther Edwin Floyd is set out in the transcript of record, page 28, that the said Luther Edwin Floyd pleaded guilty to said indictment and took a penitentiary sentence which he has since served, that this petitioner is innocent of the charges set forth in Counts No. 1 and No. 6 of said indictment and that the testimony of said Robert Carter Barrett against this petitioner is untrue, and that this petitioner has suffered a gross and grave injustice by reason of the failure of the Circuit Court of Appeals to reverse the lower Court on Counts 1 and 6 of said indictment.

CONCLUSION

Your petitioner respectfully states:

That the United States Circuit Court of Appeals failed to take judicial notice of Maximum Price Regulation 445 and the fact that the indictment in this case and the evidence offered was under Amendment 15 to said Regulation, which was not made effective until May 8, 1944, whereas the offense charged if committed, was committed in the month of February, 1944. In the month of February there was no restricted schedule to which the buyer was bound, but the only ceiling was his selling ceiling, whereas under the new amendment there was a ceiling on his purchases. To convict this petitioner on a regulation which was not yet in effect at the time he was charged with an offense is tantamount to a conviction under an ex post facto regulation and is contrary to the decisions of this Court as hereinabove mentioned.

Your petitioner further submits that the State of Kentucky has a price control act and that under the 21st Amendment to the Constitution of the United States the control of liquor, except insofar as it pertains to interstate shipments and revenue of the Federal Government, was returned to the States and that the Federal Government has no authority to interfere with the State price structure.

Your petitioner further respectfully presents that he has been done a gross injustice in the trial below. That this injustice is recognized by the Honorable Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, and that in the record there is the affidavit of said Claude P. Stephens, Record, page 179, in which he states that he had suggested to the District Court that he would recommend that the sentences herein be modified

and that a new sentence be imposed and that sentence be for twelve months in jail and a fine of $3,000.00 in lieu of the sentences theretofore imposed.

Your petitioner, therefore, respectfully submits that to relieve this petitioner of the injustices obviously imposed upon him in this case, this Court ought in the interest of justice, to reverse the judgment herein and to return this case to the District Court for a new trial.

Respectfully submitted,

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